(3)

No. 05-676

In The Supreme Court of the United States

GENE CASHMAN and EUGENIA GUINN,

Petitioners,

v.

CITY OF COTATI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does this Court's decision in *Lingle v. Chevron* preclude an independent substantially advances test that requires a close connection between the effect of an ordinance and the objective sought to be achieved by a regulatory constraint?

2. Should Petitioners' pre-*Lingle* substantially advances takings claim be decided under a due process analysis post-*Lingle*, where Circuit Court precedent prohibited Petitioners from bringing a due process claim?

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BRIEF *AMICUS CURIAE* OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

Amicus Western Manufactured Housing Communities Association is an association of 1,800 mobilehome park communities. It is the largest mobilehome park association in the United States. The Association has a vital interest in the issues raised by Petitioners because its members routinely experience similar property deprivations.[1]

Amicus and Petitioners jointly briefed the Court last term in *Lingle v. Chevron USA, Inc.*,[2] where we argued that the *Agins v. City of Tiburon*[3] takings theory was necessary to prevent arbitrary government infringement of our property rights.[4] *Lingle* overturned *Agins*, finding it "prescribes an inquiry in the nature of a due process, not a takings test," but affirmed *Amicus* and Petitioners' Fourteenth Amendment substantive due process protection from irrational property regulation, citing *Village of Euclid*

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[1] The parties have consented to *Amicus*' filing of this brief and their consent letters are filed with the Court. Neither party nor their counsel authored this brief in whole or in part, and no one other than *Amicus* financed its preparation or submission.

[2] 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (hereafter *Lingle*).

[3] 447 U.S. 225, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980) (hereafter *Agins*).

[4] *Brief Amicus Curiae of Pacific Legal Foundation; Gene Cashman; Athena Sutsos; Western Manufactured Housing Communities Association; and Defenders of Property Rights in Support of Respondent Chevron USA, Inc. Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074, 2004 U.S. Briefs 163, U.S. S.Ct. Briefs 2005.

v. Ambler Realty, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926) (hereafter *Euclid*).[5]

The Ninth Circuit has a bar to *Euclid* claims under *Armendariz v. Penman*, 75 F 3d 1311, 1319 (9th Cir. 1996) (*en banc*), and refuses to overrule it. After *Lingle* it dismisses with prejudice all allegations of irrational property regulation.[6] *Amicus* respectfully requests that the Court grant certiorari and consider restoring Ninth Circuit property owners' Fourteenth Amendment protection from arbitrary government regulation.

INTRODUCTION

The Ninth Circuit does not recognize Fourteenth Amendment substantive due process violations of property rights on the grounds that these violations are subsumed and precluded by the Fifth Amendment's Takings Clause. This blanket prohibition of substantive due process property claims is extreme because it contradicts the Fourteenth Amendment's text and history and because takings and due process violations are doctrinally distinct. The majority of circuit courts decline to follow it.[7] Last term in *Lingle* the Court agreed with the majority's reasoning and held that property infringements sounding in due process are only actionable under the Fourteenth Amendment.

After *Lingle* the Ninth Circuit's blanket prohibition of substantive due process property claims is untenable, yet the Circuit refuses to overrule it. As a result, in the Ninth

[5] *Lingle*, 125 S. Ct. at 2083-2085.

[6] *Spoklie v. Montana*, 411 F.3d 1051, 1058 (9th Cir. 2005).

[7] *John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000).

Circuit irrational and arbitrary land use regulation no longer violates the Constitution.

Petitioners are victims of this policy. In *Cashman v. City of Cotati* a Ninth Circuit court of appeals withdrew a takings judgment in Petitioners' favor under *Lingle* and summarily entered judgment against them,[8] denying their request to review Cotati's irrational deprivation of their property under the Fourteenth Amendment. The Court should grant certiorari to correct this injustice, restore harmony among the circuits, clarify that the Ninth Circuit has misinterpreted *Lingle* and affirm that municipalities can not infringe upon property owners without providing them Fourteenth Amendment due process of law.

STATEMENT OF FACTS

Petitioners Gene Cashman and Athena Sutsos (collectively Cashman) each own a mobilehome park in Cotati, California and rent spaces in their parks to mobilehome owners. In California the mobilehome park owner/tenant relationship is highly regulated. The Mobilehome Residency Law, Cal. Civ. Code § 798, severely restricts the grounds upon which a park may terminate a tenancy. In addition, a park owner may not require the removal of a home when it is sold, charge a transfer fee, nor unreasonably withhold approval of a tenant's transfer of their space lease to a new owner. (Cal. Civ. Code §§ 798.56, 798.74).

"The Mobilehome Residency Law is not and was not intended to be a rent control measure" and does not

[8] *Cashman v. City of Cotati*, 415 F.3d 1027, 1028 (9th Cir. 2005).